NO. 17051

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RUTH ETTA WITT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

APPELLANT'S OPENING BRIEF

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TO THE CHIEF JUDGE OF THE UNITED COURT OF APPEALS FOR THE NINTH CIRCUIT, AND TO THE ASSOCIATE JUSTICES THEREOF, AND TO EACH OF THEM:

STATEMENT OF THE CASE

By an Indictment returned by the Grand Jury in the United States District Court, in and for the Southern District of California, Southern Division, the defendant and appellant was charged with having violated U. S. C. Title 21, Section 174 (illegal importation of narcotics),

in that she did knowingly import and bring into the United States of America, from a foreign country, namely, Mexico, a certain narcotic drug, namely, heroin (Tr. of Rec. p. 2).

A notice of motion for the suppression of evidence was duly served and filed (Tr. of Rec. pp. 4, 5, 6), including the motion itself and points and authorities. To the indictment the defendant-appellant entered a plea of not guilty (Tr. of Rec. p. 8).

The motion to suppress was heard on two separate occasions. After the motion was heard, the same was by the Court denied, and the cause was transferred to Judge Lindberg for jury trial (Tr. of Rec. p. 16).

In connection with the motion to suppress certain evidence, Findings of Fact and Conclusions of Law were made and filed by the Court (Tr. of Rec. pp. 34-40).

After trial by a jury, the defendant-appellant was found guilty as charged in the Indictment (Tr. of Rec. p. 28).

At the conclusion of the defense case, a motion for judgment of acquittal was made by the defendant, and by the Court denied (Tr. of Rec. p. 26).

After the verdict of guilty was filed and entered, the motion for new trial and judgment of acquittal was made by the defendant and the matter continued for hearing (Tr. of Rec. p. 27).

Thereafter, a motion for new trial was duly made and denied; a motion for judgment of acquittal was made and denied; and the defendant-appellant sentenced to imprisonment for a period of 5 years (Tr. of Rec. p. 29).

Judgment executed by the Court is found at page 30 of the Transcript of Record.

Motion for new trial is found at page 32 of the Transcript of Record.

Thereafter, a notice of appeal was duly served and filed (Tr. of Rec. p. 43)

Thereafter, a Request for Designation of Record was served and filed (Tr. of Rec. pp. 44-46), which said Request for Designation of Record included a statement of points upon which the appellant intended to rely upon appeal.

The matter is now before this Court for determination, pursuant to the record herein, which is in two volumes, including the Reporter's Transcript of the testimony taken at the trial and at the time of the hearing on the Motion to Suppress.

JURISDICTION

The jurisdiction of this Court is invoked under Title 21, Section 174. The pleadings relied upon are the indictment, a motion to suppress, points and authorities in support thereof, the judgment, the minutes of the

Court showing the order denying the motion to suppress, the transcript of the record, the reporter's transcript of the proceedings at the hearing on the motion to suppress, including the evidence taken at that time, the minutes of the United States District Court, Southern District of California, Southern Division, and all of the papers and documents lodged with this Court and incorporated in the transcript of the record, and the original file in Case No. 29041, Southern District of California, Southern Division.

STATEMENT OF FACTS PERTINENT TO THE APPEAL

The Motion to Suppress.

RUTH ETTA WITT testified she was a widow, she had two children, ages 3-1/2 and 19; she was employed at the Los Angeles County General Hospital in Los Angeles, had been for 8 years; that on or about December 26, 1959, she crossed the United States border; that she was an American citizen, born in Mississippi; it was about 9:00 p.m. when she crossed the border of Mexico into the United States; she was coming from Tijuana; after they had crossed from the Mexican side to the American side, the officer, or guard, came up to the car, asked where they were born; the driver of the car told him; then the officer asked for the driver's license; the driver was a friend, Charles Anderson. Before Mr. Anderson could get his license out, the guard jumped

in the car, pushed him over, pushed her to one side, and told both of them to put their hands on the dashboard of the car and not to move. They did that. The officer drove the car over to the side and another man came up while it was being driven slowly to the side. The officers told them to get out; they got out; there were 3 or 4 men then around the car; the officers took them inside the building (R. T., pp. 3-5). This was on the American side of the border; they told her to stand there; they stood there for a few minutes, then a lady came in; she was not in uniform; she did not identify herself; the witness did not know who she was. The officers told the witness to follow them; three of them were around her and the lady was in front leading her to another part of the building. They took her into a room; there were the three men and the woman; the lady and the witness went into the room; the men did not come into the room (R. T. pp. 5, 6, 7). The lady immediately told her to take her clothes off; she said to the lady, "Why do I have to take my clothes off?", and the lady replied, "Never mind. Just take them off," and if she didn't take them off she would. She then proceeded to take her clothing off, one piece at a time; the lady told her to do it that way. After her clothing had been taken off, the lady told her to turn around with her back facing her; she told her to stoop over, that she wanted to look up her rectum and vagina. When the lady said that she told her she was not going to do that; the lady then told her again to do it. She bent over; the lady was behind her a minute or two while her back was turned; the lady put

her hands on her body; she examined her all over; her brassiere had been left on; she reached down in her brassiere; she examined her feet, her ears, her nose, her mouth; that she did not at any time consent to the search (R. T. pp. 7-9).

It was then stipulated that at the time of the examination of Mrs. Witt by the lady officer there was no warrant of arrest in the possession of the officers nor was there any search warrant (R. T. p. 9). She was in this room for about 15 minutes undergoing this examination. The lady found a package while she was turned around; she had turned her back around; the package was in her coat pocket; it was not in her brassiere; she didn't see the package until after the lady had told her to turn around and had told her to bend over; the woman had fumbled around in her brassiere and found nothing (R. T. pp. 10, 11). After the woman had the package in her hand she made no further examination. She was taken to jail about 3 hours after she had been stopped at the border. She was not told at any time before the search took place that she was under arrest; she was not told why she was being detained; she had never been arrested before in her life (R. T. pp. 11, 12).

The witness stated she had the package in her possession prior to coming into the United States. She stated she had gone down that night to meet a friend of hers; she went to take him a package for his kids; it was the day after Christmas and as she was leaving he told her he would like to have her take this package

and give it to a friend of his at the drive-in cafeteria on the other side of Tijuana; she told him she would; she took the package and put it in her pocket (R. T. pp. 16, 17). She had driven down to Tijuana with a friend of hers, Mr. Charles Anderson. When she and Mr. Anderson arrived in Tijuana they went to the race track; the car was her sister's; the man from whom she obtained the package was a man she knew fairly well; she had known him for 15 or 20 years (R. T. pp. 17, 18).

After being in Tijuana for a period, Mr. Anderson indicated he wanted to go to the Jai Alai games, and he did; she told him she wanted to visit her friend; she went to the friend's house; his name was Hill; Cruz went with her. She had been to Tijuana two or three weeks before and had told Cruz she was going to bring some presents for his wife and kids; they made an appointment to meet (R. T. pp. 20, 21, 22).

On cross examination, she stated that she had put the package in her pocket; that she had never put it in her brassiere (R. T. pp. 22, 23).

RUDOLPH L. DALE, called in behalf of the Government, stated he was a United States Customs Inspector, was employed at the port of entry, San Ysidro, California; was on duty about 9:15 p.m., on the evening of December 26, 1959; he had some information from his superiors concerning the stopping of a 1957 Mercury, hardtop, bearing California license MNJ-592, green and white in color,

with two colored ladies in the car (R. T. pp. 35, 36). He stopped the car fitting the description (R. T. pp. 35-37); found a gentleman driving, Mr. Anderson; the other occupant was a lady by the name of Ruth Etta Witt, the defendant (R. T. p. 37). He had the information that there was a possible implication of narcotics by these persons; his information was that the car would contain two colored ladies; when he saw the car there was one colored lady and a man in it; when he stopped the car he asked them their birthplace; both said they were born in the United States; asked them if they had any merchandise purchased in Mexico, and they replied none (R. T. pp. 37, 38). He caused the car to be searched and found no contraband in it; he caused Mr. Anderson to be searched, and nothing was found on him; his supervisor ordered Mrs. Witt to be searched. Mrs. Lohman, the matron, was called after he stopped the car; he asked Mrs. Witt to roll the window up on her side, he asked Anderson to move over and he drove the car to the secondary inspection, a small area adjacent to the Customs House out of the traffic lanes; he then took Mr. Anderson and Mrs. Witt into the Customs House. He came to work about 4:00 p. m., and he had been given a Lookout Bulletin, and told to be on the lookout for this car; he was given the license number and the color of the car; the information was there would be two colored women in it. When he stopped the car there was Mrs. Witt and Mr. Anderson in it; Mr. Anderson told him that he was a Los Angeles fireman (R. T. pp. 41-43).

ANNETTA W. LOHMAN testified that she was a part-time Customs Inspectress; that on December 26, 1959, she was called to the port of entry at San Ysidro; when she arrived they had a lady for her to search; she conducted a personal search on Mrs. Witt; they have a little search room right back of the baggage room in the Customs House; she told Mrs. Witt that she was a Customs Inspectress, that she would have to remove her clothes so she could make a personal search; Mrs. Witt removed her clothing completely; she searched her clothing; she found a package wrapped in a napkin in her brassiere (R. T. pp. 44, 45); she searched her clothing and found no other contraband; she gave the contraband, in a rubber contraceptive, to a Government Agent, Mr. Gates.

On cross examination, she testified that she told Mrs. Witt to take off her clothing, if she would not they would have to take further measures and have the clothing removed; after that she removed her clothing; she was in the nude; she made a careful examination of her body; that she usually looked in the mouth and ears; she examined her ears, under her arms, looked between her legs, told her to bend over she wanted to examine her rectum; she bent over and she examined her rectum; she examined her vagina; she examined her between her toes; she found nothing on the person; she examined her eyes; she did not, so far as she remembered, appear to be under the influence of drugs or liquor (R. T. pp. 47-49). The examination took 15 to 20 minutes (R. T. p. 49).

RUDOLPH L. DALE was recalled and testified that when he first said it was 4:00 o'clock when he received the information from the Information Bulletin that he was in error, that it was about 9:00 p. m. when he received the information (R. T. pp. 54, 55).

The bulletin was received as Government's Exhibit 1.

EVIDENCE ON THE MERITS AT THE TRIAL

RUDOLPH L. DALE testified he was a United States Customs Inspector at the port of entry at San Ysidro; that on the evening of December 26, 1959, he was on duty; he stopped a 1957 Mercury, green and white, two-door hardtop sedan bearing California license MNJ-592; there were two persons in the car, a gentleman, Mr. Anderson, and Mrs. Witt; Anderson was driving (R. T., pp. 62, 63); he asked Mr. Anderson and Mrs. Witt to state their birthplaces; they said the United States; he asked if they were bringing any liquor, food or plants back; they said none; he told Mr. Witt to roll the window up and told Mr. Anderson to move over, and he drove the car to the secondary inspection at the Customs House; he asked them to get out of the car; the supervising inspector, Mr. Snyder, was on the right-hand side of the car; Mr. Anderson and Mrs. Witt were escorted into the Customs Office; Mr. Anderson was searched; no contraband was found on him; he was fully stripped for this purpose;

Mrs. Lohman, the inspectress-matron, was called and she came to the office; Mrs. Witt was in the building when she arrived; that he searched the car and found no contraband in it (R. T. pp. 63-65). The officer stated that at the time he examined the car it had crossed the border and was in the United States; that when he questioned both occupants of the car they stated they were born in the United States; he said that every car that enters the line from Mexico assumedly is coming from Tijuana; he did not ask whether they had crossed the border; after he had talked with them a moment or two he told them to put their hands on the dash-board of the car and to move over, and he drove the car to the secondary inspection; up to that time they were very cooperative. He then asked them to leave the car and he searched Mr. Anderson; he examined his clothing thoroughly; found no contraband, no narcotics; he had him strip for this examination and examined his body closely; examined his rectum, his private parts, his mouth, his ears, his hair, his feet, and found no contraband or narcotics; he did not appear to be under the influence of any drug or alcohol at the time; he answered questions promptly; said he was a Los Angeles Fireman; that Mrs. Witt was a friend and that they had just come down for the day; he then sent for Mrs. Lohman, the matron (R. T. pp. 66-68). Mrs. Lohman appeared in a matter of minutes and, so far as he knew, examined Mrs. Witt; that he searched the automobile thoroughly; he found no contraband or drugs (R. T. pp. 68, 69).

ANNETTA LOHMAN, testifying on behalf of the Government, stated she was a Customs Inspectress at the border, a part-time job; her duties were to make personal searches of women suspects detained at the border; on D December 26, 1959, she was called for a search; she supervised a search of the clothing and person of Mrs. Witt; this was done in a search room in the rear of the Customs House at the border, a room used for such searches; there were just herself and Mrs. Witt in the room; she asked Mrs. Witt to remove her clothes; Mrs. Witt did so; she had her remove all her clothing; she searched each article as they were removed; when Mrs. Witt came to her brassiere she took it off and inside of the brassiere was a small package wrapped in a restaurant-type napkin; she searched her other clothing, such as the coat and dress, and found nothing; the package was identified as Exhibit 1 (R. T. pp. 71, 72). After the search she turned the package over to either Mr. Gates or Mr. Maxey, Agents.

On cross examination, she stated that after Mrs. Witt had been taken into the room she told her that if she didn't take off her clothes her clothing would be taken off of her; Mrs. Witt then removed her clothes; she then examined her body (R. T. p. 74); she examined her mouth, ears, under her arms, looked at her rectum, examined her private parts, looked between her legs, between her toes, under her feet, and found no narcotics on her body; she did not appear to be under the influence of any narcotic or alcohol (R. T. pp. 74-76). She denied planting the package in Mrs. Witt's coat

pocket; she only vaguely remembered seeing a coat; she examined all of her clothes; she made no list of the clothing she examined; it was a sweater, blouse, skirt, underwear; she found nothing in the clothing, nothing but the package in the brassiere; the search took 15 to 20 minutes (R. T. pp. 76, 77). Mrs. Witt was cooperative after she once got her to take her clothing off; she wasn't anxious to take her clothing off, but after she was told that unless she took it off, it would be taken off of her, then she took the clothing off (R. T. pp. 77, 78).

WALTER A. GATES testified he was a Customs Agent of the United States Customs Service; had been such for 6 years; that on December 26, 1959, he went to the port of entry of San Diego; he was present at the interrogation of the defendant (R. T. p. 79); present in the room were Customs Inspectress Annetta Lohman, Customs Agent John Maxey, Mrs. Witt and Gates; Mrs. Witt stated she and her companion, Mr. Anderson, had arrived in Tijuana about 7:00 p. m. on the 26th; she said they went to the Jai Alai games, she became tired and went out to the car, rested for a few moments; she stated they had been to Tijuana once some time previous; he first talked to Mr. Anderson, and then talked to Mrs. Witt about 45 minutes later; she stated that she had been given the money for the narcotics by a man in Los Angeles by the name of Bo; that she met this Mexican in Tijuana, had given him some money and had taken the narcotics; she was supposed to deliver the narcotics to Bo at the corner of

Central and Vermont, in Los Angeles, and receive $100; he stated that at the time Mrs. Witt was first interviewed the statement was recorded; the statement was never transcribed; he denied Mrs. Witt had told him that the package had been given to her by a friend to be given to somebody (R. T. pp. 80-86). He denied that Mrs. Witt in the second conversation told him that a package had been given to her by a friend and that she was to deliver it, and she didn't know what was in the package; he admitted that in his report he had made a statement,

> "The only statement of any consequence made by Mrs. Witt during the interview was that she was to receive $100 for making the trip, that she had been given money to pay for the narcotics, and she was then to deliver it to a person known to her as Bo at Vernon and Central Streets, in Los Angeles, California...";

that he was mistaken about Vernon and Central; Mrs. Witt told him she had been shopping, looking around the town; Mrs. Witt had told him that, under all the circumstances, she would like to talk to her lawyer; he didn't recall that Mrs. Witt told him that she was willing to submit to a lie detector test (R. T. pp. 87-89). He stated that in the first conversation which he recorded Mrs. Witt denied having any knowledge that the package contained a drug (R. T. pp. 89, 90).

JOHN MAXCY testified he was present at the conversations involving the defendant to which Agent Gates had testified; that he received Government's Exhibit 1 from Mrs. Lohman (R. T. pp. 91, 92); that his answers would be the same if the questions put to Mr. Gates were put to him (R. T. pp. 91, 92)

On cross examination he stated that he was present at the first conversation with Mrs. Witt and during the conversation she said she had no knowledge there was any narcotic or contraband in the package (R. T. p. 93); Mrs. Witt was not asked about a lie detector test; he was present with Mr. Anderson when he was questioned; Anderson stated he was willing to take a lie detector test; said he was a Fireman in Los Angeles, that he had been for 10 or 12 years; that he was a friend of Mrs. Witt; that he had known Mrs. Witt for quite a few years; that he and she had gone down for a visit and had gone to the race track (R. T. pp. 93, 94); there was a recording device in operation at the first conversation, it was not transcribed; that Mrs. Witt said that she was a widow, had two children, worked at the County Hospital in Los Angeles; that the package had been given to her and that she had no knowledge that it contained narcotics (R. T. p. 95). The officer then stated she preferred not to give answers to questions other than her name, occupation, and the names and ages of her children; she had said she had gone over to the Jai Alai games.

"Q. And she told you that she had been given the package; isn't that

right?

"A. I believe she did, but I really don't remember that.

"Q. You wouldn't say that she didn't say that, would you?

"A. I wouldn't say she didn't say it, no." (R. T. pp. 95, 96).

He stated that a report was made by himself and Mr. Gates; that he dictated the report stated:

"Q. I will ask you if it does not state: 'There were present in the Customs Agency Service, San Diego (San Ysidro), California on December 26, 1959, for the purpose of interrogating Ruth Etta Witt and Charles Willard Anderson regarding a seizure of heroin found concealed on the person of Mrs. Witt. Also present during the interview was Customs Inspectress Annetta W. Lohman.'

That appears in the report, does it not?

"A. She was present, yes, sir." (R. T. p. 98).

He stated that all the report said about where the package was found is "regarding a seizure of heroin found concealed on the person of

Mrs. Witt." (R. T. p. 98). The witness examined the document and then said,

> "That's correct, sir, 'found on the person'."

There was nothing said in the report about finding the package in the brassiere or in the coat (R. T. pp. 98, 99); that the report said Mrs. Lohman was present during the interview with Mrs. Witt, and she was present during the interview with Mrs. Witt, and she was present during the entire interview conducted with Mrs. Witt (R. T. pp. 100, 101).

Without waiving any rights to objections that might be made to the reception of Exhibit 1, it was stipulated between counsel for the Government and defendant-appellant that if Mr. Schneider, the chemist, was called and would testify concerning Exhibit 1 that he examined the contents and in his opinion it contained heroin (R. T. pp. 101-103).

It was then stipulated between counsel for the Government and the defendant-appellant that if Helen E. Grotefend were called she would testify she was a Seizure Clerk employed by the United States Customs Service at San Diego, that she would testify she received Government's Exhibit 1 from John Maxcy, Custom Agent, that she mailed it by registered mail to Albert H. Schneider, Chemist, employed by the United States Customs Service, Los Angeles; she then received the package from the Government chemist by registered mail, placed the same in her seizure locker

where it remained in her custody until it was brought into court (R. T. pp. 103, 104).

The exhibits were then offered, No. 2 being the stipulation regarding the expert opinion, then No. 3, the stipulation regarding the testimony of the seizure clerk.

Objections were then made to the effect that Exhibit 1 was obtained as a result of an unlawful search and seizure in violation of the Fourth and Fifth Amendments to the Constitution of the United States, and that it constituted a denial of due process of law. The Court stated he had read the report of the proceedings before Judge Carter, and that the judge stated he had heard further testimony that morning, and that the motion to suppress had been denied, that he was inclined to favor the ruling of Judge Carter, the transcript of the proceedings that morning were filed as Exhibit 4, it was not to go to the jury (R. T. pp. 105, 106).

The Government rested.

The defendant-appellant moved for a judgment of acquittal (R. T. pp. 107-109).

RUTH ETTA WITT testified she lived in Los Angeles; she was employed by the County of Los Angeles; she was a widow, had two children; she understood the nature of the proceedings; she did not knowingly bring any heroin across the border on December 26, 1959; that she was in Tijuana that day with Mr. Charles Anderson; they crossed the

border about 3 or 4 in the afternoon; they went to the race track; they were there 2 or 3 hours; Mr. Anderson was with her; they then went shopping in the downtown area, Mr. Anderson was with her; they went to the Jai Alai games; she was there about 30 minutes; she left Mr. Anderson at the Jai Alai games, she had some place to go, she had a previous appointment to meet Mr. Cruz Macias; she had known him 10 or 15 years (R. T. pp. 112-116). They were friends; she had some Christmas presents for him; she had brought them from Los Angeles; she met Mr. Macias; Mr. Anderson was not with her at the time she met Mr. Macias (R. T. pp. 116, 117). She testified she gave him the presents; Mr. Macias told her he wanted her to go with him to a friend's house; she had never been there before; she met a man there called Hill; Macias called him Hill; she had never seen him before (R. T. pp. 116, 117). They were there 25 or 30 minutes; while there Mr. Macias gave her a package, it was wrapped in white paper and asked her if she would do something for him; she said she would if she could; he asked her to take a package and give it to a man over across the border; she said, is it all right for me to give it to him, and Macias replied, yes; she then took the package; she did not at any time know it contained Heroin or any narcotics (R. T. pp. 117, 118). She put the package in her coat pocket; her coat was red; she kept the package in her coat pocket from the time Macias gave the package to her until she reached the border; she never put it in her brassiere (R. T. pp. 118, 119). She met Mr. Anderson after she had seen Cruz; she went

directly from Hill's house to the Jai Alai games where Mr. Anderson was; they left the Jai Alai games; they stopped, got some gasoline, then went to the border; they crossed the border (R. T. pp. 119, 120). They came to the border, a man asked them were they were born; she told him she was born in Mississippi, and Mr. Anderson said he was born in Los Angeles; the man then asked Mr. Anderson for his driver's license, but before Mr. Anderson could get it, the man got in the car, pushed Mr. Anderson over and pushed her over, he then said for them to put their hands on the dashboard and not to move; they did this. The man drove the car over near the building (R. T. pp. 120, 121). Two other men were standing there, one man told them to get out of the car and they took them into the building. It was dark. She was taken into a room by Mrs. Lohman. Mrs. Lohman told her to take her clothes off; she asked Mrs. Lohman why did she have to do that, and Mrs. Lohman said, never mind, take them off, and said if you don't take them off I will have to take them off for you; she then took her clothes off (R. T. pp. 120-122). She did not have a package in her brassiere. When she started to take her clothes off she put her purse and coat on the desk that was in the room, and as she took them off she handed them to Mrs. Lohman; she took all of her clothes off; she didn't have a package in her brassiere (R. T. pp. 121, 122); that she had her back to the matron; the matron told her to stoop over for she wanted to examine her rectum; she stooped over and when she turned around the matron was feeling all over her back, pulling her skin

apart, and when she turned around the matron had this package in her hand; she did not see where she got it from; so far as she knows the package had always been in her coat from the time it was given to her by Mr. Macias (R. T. p. 122); she did not actually see where the matron took the package from; it had never been in her brassiere (R. T. pp. 122, 123). She testified that the matron examined her whole body, her mouth, her ears, under her arms, between her legs, her toes, the bottom of her feet; after she had been examined she was given back her clothes (R. T. pp. 123, 124).

She testified that she did not at any time tell the officers that she knew the package contained heroin; they wanted to know where she got the package and she told them it was given to her by a man; this had never happened to her before, and she didn't understand what was wrong; she was then asked whether she knew it contained heroin (R. T. pp. 124, 125); she replied that she did not; that she did not, in truth and in fact, know it contained heroin (R. T. pp. 125, 126); she did not at any time state to the officers that she was to get $100 for making the trip; she did not at any time say she had been given money to pay for the narcotics; she did not at any time say she was to deliver the narcotics to a person known as Bo at Vernon and Central; she did not know any man by the name of Bo; she did not until after she had been arrested know that the package contained heroin (R. T. pp. 125, 126); she had never been arrested before and had no knowledge of narcotics (R. T. p. 126). She

testified that Mrs. Lohman was in the room when she testified and she did not know her testimony was being recorded; she stated she had worked at the Los Angeles County Hospital for eight years (R. T. pp. 127, 128); she had heard about narcotics in the hospital (R. T. pp. 127, 128); she stated that when Cruz Macias gave her the package she asked him if it was all right (R. T. p. 130); she knew she would have to go through the customs inspection when she crossed the border (R. T. p. 131); that Cruz Macias did not indicate what was in the package; she took it and put it in her pocket (R. T. p. 132).

The defense then rested, and the motion for judgment of acquittal was then renewed (R. T. p. 136).

The statement, Exhibit A, was received in evidence (R. T. p. 137).

QUESTIONS TO BE PRESENTED

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

II.

THE EVIDENCE WAS NOT SUFFICIENT.

III.

WHILE TITLE 26 U.S.C.A., SECTION 7237, SUBDIVISION D, PROHIBITING SUSPENSION OF SENTENCE FOR THE GRANTING OF PROBATION UPON CONVICTION OF DESIGNATED NARCOTICS OFFENSES AGAINST THE UNITED STATES APPEARS TO BE FAIR ON ITS FACE, ADMINISTRATIVELY IT IS APPLIED WITH AN EVIL EYE AND AN UNEQUAL HAND IN A MANNER FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN AN UNJUST DISCRIMINATION BETWEEN LIKE OFFENDERS AND THE PRIVILEGES AND PENALITIES OF LAW.

SPECIFICATIONS OF ERROR

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence (Tr. of Rec. pp. 4-8). Evidence was offered to the effect that there was no search warrant, no warrant of arrest, and after the defendant-appellant crossed the border from a visit to Mexico, after perfunctory questions as to where she was born (the United States) the Customs Agent ordered her and her companion to move over, and the car was driven by the Agent to the side of the Customs Office. The defendant-appellant was there thoroughly searched by a matron, and in her brassiere the matron claimed she found a package. It was claimed the package was given to her in Mexico by a friend and that it was in her coat pocket. The only reason for stopping the car in which appellant was riding was the direction to the Customs Agent by a superior to be on the lookout for a car answering the description of the car occupied by appellant containing two colored women. The car contained the appellant and a colored man. The Court erred in denying the motion to suppress. The Court made Findings of Fact and Conclusions of Law (Tr. of

Rec. pp. 34-40). The Court erred in denying the motion to suppress - the search was invalid.

II.

THE EVIDENCE WAS NOT SUFFICIENT.

If the Court had granted the motion to suppress the use of the contraband obtained as a result of an unlawful search, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

The Court instructed the jury to the effect that there was possession in the appellant and such possession created a permissible inference of guilt.

Without the evidence of the contraband, and without such instruction, the evidence was not sufficient. The Court erred in denying our motion for judgment of acquittal (Tr. of Rec. p. 26). The motion was renewed and denied at the time of making the motion for new trial, and the Court denied the same (Tr. of Rec. p. 29).

III.

WE CONTEND THAT AT THE TIME OF SENTENCE THE COURT HAD THE INHERENT POWER TO SUSPEND SENTENCE AND GRANT PROBATION.

A section was applied in a manner forbidden by the Due Process Clause of the Fifth Amendment. It amounted to an unjust discrimination between like offenders. If the prosecutor can elect to indict under a section which forbids probation, or may elect to file an information under a section which gives the court the power to grant probation, we say the application of the law amounts to a denial of due process.

At the time of pronouncement of judgment, appellant asked the Court to grant probation, the Court stated:

> "However, the statute which is involved here, and under which you were charged and under which you have been convicted provides for a minimum sentence of five years, which is mandatory, so the court has no choice." (R. T. p. 196).

The Court further said:

> "I have observed in the pre-sentence report that you have had no prior conviction, that you have been gainfully employed, you have been married, and you have two children, I think 4 and 19,

and that your husband died in 1955." (R. T. p. 196).

We contended, as stated at the time of judgment:

> "I believe that the court does have the power, the inherent power to suspend sentence, and even though it might impose a minimum sentence, I urge that the court has the power and the constitutional right under the creation of this court to impose probation, subject to the restrictions as the court itself deems reasonable, and I urge upon you that you do so." (R. T. p. 198).

The motion for probation was denied (R. T. pp. 198-199).

SUMMARY OF ARGUMENT

1. It is our contention that the evidence was insufficient. The search was made in the absence of a warrant of arrest, in the absence of a search warrant, and there was no reasonable cause for the search. The appellant had been to Mexico, had been given a package, the contents of which she denied she had knowledge of, and after crossing the border the Customs Agent, because he had been alerted to be on the lookout for a certain car containing two colored women, forced the appellant against her will to submit to a most thorough search covering every portion of her anatomy.

2. The Court erred in denying the motion for judgment of acquittal. The evidence was not sufficient in the absence of a contraband unlawfully seized and in the absence of the instruction to the effect that the appellant would be required to satisfactorily explain possession of the contraband. There was not sufficient evidence.

3. It is our contention that Title 26, Section 7237, Subdivision (d) deprives the trial court of an inherent power to suspend sentence and grant probation, and in this case the section was applied in a manner forbidden by the Due Process Clause of the Fifth Amendment which amounted to an unjust discrimination between like offenders. In other words, it gives to the prosecutor the right to select a section of the code which has a minimum sentence and which denies to the trial court the right to grant probation. Its application is a denial of the Due Process Clause, for in some instances the prosecutor selects a section of the code for like offenders, for like offenses, which permits probation; in others he selects a section of the code, as in this case, which forbids the court granting probation. Such amounts to an unequal enforcement of the law and amounts to a denial of due process.

PERTINENT STATUTES

U. S. C., Title 21, Section 174:

"If any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years. Whenever on trial for a violation of the section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be demmed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

ARGUMENT

I.

THE EVIDENCE, NAMELY, THE NARCOTICS, WAS OBTAINED AS A RESULT OF AN UNLAWFUL SEARCH AND SEIZURE. THE COURT ERRED IN DENYING THE DEFENDANT-APPELLANT'S MOTION TO SUPPRESS.

The defendant-appellant, prior to the trial, made an appropriate motion to suppress the evidence (Tr. of Rec. pp. 4-8). Said motion was supported by points and authorities. The hearing was held before the Court, at which time evidence was offered in support of the motion. The hearing was continued for the taking of further evidence. The motion to suppress was denied (Tr. of Rec. p. 16). The Court made findings of fact and conclusions of law (Tr. of Rec. pp. 34-40).

We have carefully reviewed the evidence in the statement of facts pertinent to the appeal, and will not here repeat it, in the interest of brevity.

Summarized, the evidence shows that Mrs. Witt, a widow, of Los Angeles, employed by the County of Los Angeles, at the General Hospital for some 8 years, had known her friend, Mr. Anderson, a Los Angeles Fireman, for some 10 or 12 years; they had gone to Tijuana, to the race track, the Jai Alai games; Mrs. Witt had gone downtown in Tijuana looking at the stores

and she met a man by the name of Cruz Macias whom she had known before and whom she had agreed to meet. Upon meeting Mr. Macias, he took her to another house where she met a man by the name of Hill. Macias asked Mrs. Witt to take a package for him and deliver it to a friend of his; she asked if that was all right and he replied it was; she says she put the package in her coat pocket; that she later met Mr. Anderson, they stopped for gasoline at a service station and then Mr. Anderson drove the car to the border and crossed the border. At the border the inspector asked them where they were born; Mr. Anderson answered in Los Angeles, Mrs. Witt in Mississippi; they were asked if they had brought any liquor or merchandise across the border, and they replied no; at this time the inspector at the Customs Office on the United States side of the border told Mrs. Witt and Mr. Anderson to put their hands on the dashboard of the car; he then told them to move over and he climbed in the car, drove it over to the side of the Customs House, and they were then taken into the Customs Office. Anderson was thoroughly searched after having been stripped; he was asked if he would submit to a lie detector test, and he said he would. He denied any knowledge of any narcotics; none were found on him or in the car. A matron was sent for, a Mrs. Lohman, who was a Customs Office Inspectress, and she took Mrs. Witt into a room and told Mrs. Witt to take off her clothes. Mrs. Witt stated she wanted to know why and she was told, in effect, that she had to take her clothes off or they would be taken off for her. After this statement to her by the Customs matron, Mrs.

Witt took her clothes off. The clothing was searched; Mrs. Witt's body was minutely examined, her mouth, her ears, her hair, her feet, her private parts; the matron looked in her rectum; felt her skin; examined her vagina; and after such examination stated to Mrs. Witt she had found a package in Mrs. Witt's brassiere. Mrs. Witt denied ever having the package in her brassiere, and said she had received it from Mr. Cruz and put it in her coat pocket, and that it had been there at all times. She did not see the matron take the package from her coat or elsewhere, but the matron testified that she had found it in the brassiere. Mrs. Witt denied it was ever there.

The only information the officers had concerning Mrs. Witt or this automobile was they had received information from a superior to stop and examine a car answering the description of the car in which Mrs. Witt was riding, and this information was to the effect there would be two colored women in the car. There were not two colored women in the car; it was occupied only by Mr. Anderson, the Los Angeles Fireman, and Mrs. Witt.

It is our contention that in the absence of a warrant of arrest, the absence of a search warrant, or in the absence to a search incident to a lawful arrest, the Court erred in denying the motion to suppress. There was no reasonable or lawful reason for this arrest. The inspector did not have before him anything which justifies this search.

A person aggrieved by an unlawful search

and seizure may move the Court for the return of the property and to suppress for use anything so obtained on the grounds that the property was illegally seized without a warrant. (Rule 41(e), Federal Rules of Criminal Procedure).

No search warrant having been obtained or having been used in this case, no warrant of arrest having been obtained or secured, and the search not being incident to a lawful arrest, it is our contention that the Court certainly erred in denying the motion to suppress. There was no lawful reason for this search. The officers did not have before them any information, any reasonable or probable cause for making the search; they had the bare statement of a superior to stop a car answering this description, it contained two colored women, and to make a search.

Mrs. Witt was never told she was under arrest until after the search had been made, and the record is barren of any information which justified the search.

As was said in Johnson v. United States, 68 S. Ct. 367, 333 U.S. 10, pages 13 and 14:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized."

It is our contention that the case of Blackford v. United States, 247 F. 2d 745, decided by this Court in July, 1957, based upon the question of the legality of search and seizure by Government Agents at the border without warrant and, while from the facts of that case, it was held the search and seizure was legal and with reasonable and with probable cause, the law with reference thereto is clearly stated in Blackford v. United States, supra, 247 F. 2d 745, 750:

> "The Fourth Amendment provides that, 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * *.' It makes no difference between persons and property. It does not value property over human anatomy, nor differentiate between them. The prohibition is broad and unqualified. All unreasonable searches and seizures are forbidden. (cases cited). It is true, as heretofore noted, that historically the Fourth Amendment was designed to curb the nefarious practice of arbitrary government invasion of private homes. But the Framers of our Constitution in their infinite wisdom did not produce so narrow a safeguard. The Amendment they enacted did more than simply provide protection against immediate threat. It provided a bulwark against unreasonable governmental searches and seizures conducted on persons as well as places."

It should be borne in mind that this search was made without any warrant, without any reasonable or probable cause, and the case of Miller v. United States, 2 L. Ed. 1332, 1337, reverses the history of unlawful searches, particularly where no notice or sufficient warning of the intentions of the officer is given to the occupant of his home before they entered it. No notice of this search was given nor the reason therefor. Mrs. Witt was taken out of the car, taken into a room, and even the officer admits that Mrs. Witt did not consent to the search. Mrs. Witt was told in substance to "either take off her clothes or they would be taken off of her". Every inch of her anatomy was then thoroughly searched.

Throughout the United States the courts have become alerted to the failure of officers to obtain search warrants and the continuous unlawful arrest of people and search of their person, cards and premises has been condemned. Only recently, in the case of People v. Cahan, 44 Cal. 2d 434, the Supreme Court of California, reviewing the history of searches, and particularly in this State and throughout the country, reversed the rule concerning the admission of evidence obtained by search and seizure as a wrong which had been in force in California for almost half a century. As was said in People v. Cahan, supra, 44 Cal. 2d 434, 446, 282 P. 2d 905:

> "It is morally incongruous for the state to flount constitutional rights and at the same time demand that its citizens observe the law. The end that the state

seeks may be a laudable one, but it no more justifies unlawful acts than a laudable end justifies unlawful action by any member of the public. Moreover, any process of law that santions the imposition of penalties upon an individual through the use of the fruits of official lawlessness tends to the destruction of the whole system of restraints on the exercise of the public force that are inherent in the 'concept of ordered liberty'. (See Allen, The Wolf Case, 45 Ill. L. Rev. 1, 20.) 'Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a law-breaker, it breeds contempt for law, it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means - to declare that the Government may commit crimes in order to secure the conviction of a private criminal - would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.' (Brandeis, J., dissenting in Olmstead v. United States, 277 U.S.

438, 485 (48 S. Ct. 564, 72 L. Ed. 944, 66 A. L. R. 376); see also State v. Owens, 302 Mo. 348, 377 (259 S. W. 100, 32 A. L. R. 383); Atz v. Andrews, 84 Fla. 43 (94 So. 329, 332); Youman v. Commonwealth, 189 Ky. 152 (224 S. W. 860, 866, 13 A. L. R. 1303); State v. Arregui, 44 Idaho 43 (254 P. 788, 792); State v. Gooder, 57 S. D. 619 (234 N. W. 610, 613).)

"If the unconstitutional conduct of the law enforcement officers were more flagrant or more closely connected with the conduct of the trial, it is clear that the foregoing principles would compel the reversal of any conviction based thereon. Thus, no matter how guilty a defendant might be or how outrageous his crime, he must not be deprived of a fair trial, and any action, official or otherwise, that would have that effect would not be tolerated. Similarly, he may not be convicted on the basis of evidence obtained by the use of the rack or the screw or other brutal means no matter how reliable the evidence obtained may be. (Rochin v. California, supra, 342 U. S. 165.) Today one of the foremost public conerns is the police state, and recent history has demonstrated all too clearly how short the step is from lawless although efficient enforcement of the law to the stamping out of human rights. This peril has been recognized and dealt with when its challenge has been obvious; it cannot be forgotten when it strikes

further from the courtroom by invading the privacy of homes."

The search of Mrs. Witt could only be justified if the searcher, the officer, had probable cause to believe that Mrs. Witt was carrying contraband or committing a crime. This means not only that the officers must have actually believed that Mrs. Witt was carrying contraband or committing a crime, but that there was a reasonable basis for that conclusion (Clay v. United States, 5th Cir. 1956, 239 F. 2d 196, 202).

The only basis for this search, as we have said before was some information given by a superior to the officers in charge of the search to stop this car containing two colored women and search it. Where did the superior get the information? What was the source of it? There is nothing upon which to determine that there was any reasonable cause for this search.

The burden of showing probable cause is upon the Government.

Wrightson v. United States (D. C. Cir. 1955), 222 F. 2d 556.

It has been said that when the only basis for the arrest is an informer's tip, this burden requires an affirmative showing of reasonable grounds for reliance.

United States v. Walker (7th Cir. 1957), 246 F. 2d 519;

Contee v. United States (D. C. Cir. 1954), 215 F. 2d 324;

Draper v. United States (10th Cir. 1957), 248 F. 2d 295, affirming (D. Colo. 1956), 146 F. Supp. 689.

In the instant case we had no information as to why a superior said to stop and search the car. Surely that is not enough.

Evidence acquired in violation of the Fourth Amendment prohibition against unreasonable searches and seizures is not admissible in Federal prosecutions. Concerning this there can be no question.

Weeks v. United States, 232 U. S. 383.

The Fourth Amendment contemplates judicial supervision of searches and seizures.

Henry v. United States, 4 L. Ed. 2d 134, (U. S. S. Ct. Nov. 23, 1959).

In Henry v. United States, supra, the Supreme Court stated:

"The fact that the suspects were in an automobile is not enough."

Carroll v. United States, 267 U. S. 132, liberalized the rule governing searches when a moving vehicle is involved, but that decision merely relaxed the requirements for a warrant on grounds of practicality. It did not dispense with the need for probable cause.

All the fruits of an illegal search are inadmissible.

Silverthorne Lbr. Co. v. United States, 251 U.S. 385.

II

THE EVIDENCE WAS NOT SUFFICIENT

We have fully stated the evidence and, if this Court should order that the narcotics or contraband was obtained as a result of an unlawful search and seizure, then and in that case the Government's case would fall, for without the narcotics there would be no substantial evidence to sustain the conviction.

We are not unmindful of the problems of the trier of fact and that of the Appellate Court, but in this case there was no substantial evidence that the defendant had guilty knowledge of the nature of the contraband. Her answers throughout were those of an innocent person and, with the exception of a statement given to the officer in the second conversation which was not recorded wherein it is alleged she made some admission of a damaging character, her entire conduct was that of an innocent person. It should be borne in mind that the presumption of innocence prevails and her guilt was not established beyond a reasonable doubt.

To sustain a conviction in a case such as this the Government offered, and the Court gave, the following instruction:

> "Another statute has application to the offense charged here, and that is Section 174 of Title 21 of the United States Code, which provides as follows:
>
> 'Whenever on trial for violation of

this' . . . statute 'the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'

The statute I have just read does not change the fundamental rule that a defendant is presumed to be innocent until proven guilty beyond a reasonable doubt. Nor does it impose upon the defendant the burden of producing proof that the heroin was lawfully imported or any other evidence. As previously stated, the burden is always upon the prosecution to prove guilt by the evidence beyond a reasonable doubt. What the statute I referred to and just read a moment ago does do, however, is to create an inference in favor of the United States. Thus, if you should find from the evidence, beyond a reasonable doubt, that there was possession, as that term will be defined to you, on the part of the defendant of any of the heroin referred to in the indictment, such possession creates a permissible inference of guilt as charged in the indictment.

As against that inference there is the possible contrary inference

that the heroine was not imported contrary to law, or that the possession thereof was innocent."

It is our contention that such an instruction places upon the defendant a burden which he should not be subjected to. For instance, the instruction said: "Such possession creates a permissible inference of guilt as charged in the indictment." (The instruction just hereinabove referred to is found at pages 165 and 166 of the Reporter's Transcript.)

Title 21, Section 174, does not mean that an accused must take the witness stand and explain his possession of narcotics, and a trial court has a duty to make this clear. We raise this point in connection with the sufficiency of the evidence because we think it has a direct bearing here, for a defendant is placed in a position by reason of this instruction and rule that he must of necessity take the stand and explain possession, which places him on either horn of a dilemma; if he fails to take the stand and explain, then an inference of guilt is permissible, according to the instruction; if he takes the stand and explains, if it is not satisfactory to the jury, then he is in no better position than he was before, for the jury under this instruction may draw "a permissible inference of guilt."

The Fifth Amendment to the United States Constitution provides that no person . . . shall be compelled in any criminal case to be a witness against himself, and Congress has provided that a failure to testify cannot be used

even as a presumption against a defendant (Title 18, Section 3481; Bruno v. United States, [1939] 308 U. S. 287). For these reasons, Title 21, Section 174, can not be and has not been, so far as we know, interpreted as requiring the accused to take the stand on his own behalf.

The instructions of the District Court in this case suggest not that the jury may reasonably infer the additional necessary elements of the crime charged if an accused does not show their absence, but that the accused himself must explain to the jury his possession of contraband.

Moreover, a statutory presumption such as Title 21, Section 174, must be reasonable even though it is nothing more than a "rule of evidence." Tot v. United States [1943] 319 U. S. 463.

It is our contention that Title 21, Section 174, as applied in this case is unconstitutional for it would, as in this case, violate the rule of presumption of innocence and reasonable doubt.

It will be noted that the concluding sentence of Section 174, Title 21, contains this statement " ... such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury." This, we contend, is contrary and in violation of the Fifth Amendment to the Constitution of the United States, a violation of due process of law.

The Supreme Court has without exception held the Constitution the "supreme law of the land," and superior to acts of Congress of the United States repugnant to the Constitution, have without hesitation on the part of the United States Supreme Court been voided. As was said in the case of West Virginia State Board of Education v. Barnette, 319 U.S. 646, at 671:

> "The very purpose of the Bill of Rights is to withdraw certain subjects from the vicissitude of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the Courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

In United States v. Butler, 297 U.S. 62, the Court held:

> "The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down."

But for the evidence obtained as a result of the unlawful search and seizure, as we contend and this instruction hereinabove complained of involving Title 21, U.S.C., §174, wherein the burden is shifted to the defendant, it is our contention that the evidence is woefully weak

and not sufficient to sustain the conviction.

III

WHILE TITLE 26, U. S. C. A., §7237, SUBD. D, PROHIBITING SUSPENSION OF SENTENCE FOR THE GRANTING OF PROBATION UPON CONVICTION OF DESIGNATED NARCOTICS OFFENSES AGAINST THE UNITED STATES APPEARS TO BE FAIR ON ITS FACE, ADMINISTRATIVELY IT IS APPLIED WITH AN EVIL EYE AND AN UNEQUAL HAND IN A MANNER FORBIDDEN BY THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IN AN UNJUST DISCRIMINATION BETWEEN LIKE OFFENDERS AND THE PRIVILEGES AND PENALTIES OF LAW.

Subdivision d, Title 26 U. S. C. A., §7237, here under attack, depriving the trial court of an inherent power to suspend sentence and grant probation, is as follows:

> "No suspension of sentence; no probation, etc. -- Upon conviction (1) of any offense the penalty for which is provided in subsection (b) of this section, subsection (c), (h), or (i) of §2 of the Narcotics Drugs Import and Export Act, as amended, or such Act of July 11, 1941, as amended,

or (2) of any offense the penalty for which is provided in subsection (a) of this section, if it is the offender's second or subsequent offense, the imposition or execution of sentence shall not be suspended, probation shall not be granted, section 4202 of Title 18 of the United States Code shall not apply, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and the following), as amended, shall not apply."

While aside from the inherent power of the trial court to suspend sentence for the imposition of judgment to grant probation, in the interest of justice in deserving cases there is an unjust discrimination between like offenders for violation of the narcotic laws of the United States, for administratively the laws are applied with an evil eye and an unequal hand in a manner forbidden by the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

In Latham v. United States (C.A. Fla. 1958), 259 F. 2d 293, the Court there considered the question of excluding probation or parole for first term narcotic offenders and held it to be constitutional as against the claim that it deprived the judiciary of power to grant probation and parole in violation of doctrine of the separation of powers.

In order to make our point clear, the appellant takes the position that while the statute appears to be valid on its face, it is

administered by prosecuting officers of the Government with an evil eye and an unequal hand, for it was held in Gore v. United States, (D.C. 1957), 244 F. 2d 763, affirmed by the Supreme Court, 357 U. S. 386, holding that the purpose of this section is to provide mandatory minimum sentences and to permit increasing higher maximum sentences for repeated violations of the narcotic laws as a deterent to criminals who engage in illegal drug traffic and to increase the penalties for illegal traffic of narcotics.

We recognize that prosecutors can and do make bargains with informers, and it has been held that the United States Attorney has power to nolle prosequi or dismiss a prosecution against an informer who testifies for the Government. (See Ex Parte Altnan, 34 Fed. Supp. 106). This places an unfair power in the hands of the prosecutor who is charged with treating all persons alike. It would amount to a denial of due process of law, we contend, for offenders in like position, that is, offenders who have violated the same law, under the same circumstances, to be prosecuted differently at the whim or caprice of the United States Attorney.

The injustice of this, we think, can be established by recourse to the files of this very court. For instance, let us take the case of Marcella v. United States, No. 16910, now awaiting determination on appeal before this court. Marcella was convicted by a jury, sentenced to 40 years without privilege of probation or parole, while the three confessed

narcotic users and peddlers who appeared as witnesses against him were dealt with in an entirely different fashion. The Government witness Browning was not even charged with an offense, and it may be remembered that he was a witness in the case of Stein v. United States, No. 16309. This man is a confessed narcotic user and peddler. The other witnesses in the Marcella case who had pled guilty and who by their own testimony first approached Marcella and attempted to induce him to get narcotics for them, after pleading guilty, they were permitted to withdraw their plea, then the information was filed against them and they received probation.

Other cases could be brought to this court's attention to show the unfair enforcement of the law under these circumstances. Even the court has the power to use its own judgment and all defendants should be treated alike. If discretion is to be used, it should be the discretion inherent in the court and not in the prosecutor.

What was said in Yick Wo v. Hopkins, 118 U. S. 220, at 227, is particularly appropriate here:

> "For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their

administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

CONCLUSION

WHEREFORE, it is respectfully urged that the Court reverse the judgment herein.

Respectfully submitted,

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and
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